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STUDENT ATHLETES AND THE BUCKLEY AMENDMENT: RIGHT TO PRIVACY DOES NOT INCLUDE RIGHT TO SUE

PAUL J. BATISTA

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I. INTRODUCTION

Every student-athlete competing in intercollegiate sports is familiar with the Buckley Amendment, and the right to privacy contained therein. Formally known as the Family Educational Rights and Privacy Act of 1974,1 or “FERPA”, the Buckley Amendment prohibits release of a student’s educational records by any educational agency or institution receiving federal funds. The Act requires each institution to notify all students of their rights accorded under the Act.2 Accordingly, a student might presume that his or her educational records are strictly confidential, and that violation of this federal law would allow the student to recover monetary damages from the person or educational institution unlawfully releasing the records. That presumption is wrong.

To examine the issues arising from application of the Buckley Amendment, consider two hypothetical student-athletes: Both are highly-recruited basketball players currently playing at a nationally renowned NCAA Division I University. John is a sophomore who has had several disagreements with his coach over playing time, and who has sought the support of other players and prominent alumni to have the current coach fired after an unexpectedly bad season. Mary is a junior pre-med student with a 3.8 GPA who has recently been named to the Academic All-America Team, and has led her team deep into the NCAA tournament.

While the local media is inundated with university press releases and other information about Mary’s academic achievements, there are constant rumors about the fallout among the men’s basketball team caused by John’s disenchantment. The sports editor of the local newspaper decides that an article comparing the effect each player has had on his or her team would create an interesting and provocative article. The editor assigns a reporter to gather information on both players from the respective coaching staffs, and authorizes the reporter to write an article comparing the effect of the “good” and “bad” student on team morale and the won-lost record.

The reporter finds that the women’s coach can’t say enough good things

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2. 20 U.S.C. § 1232g (e).
about Mary. She brags about the academic support services available to all female student-athletes and provides anecdotal stories about Mary making the high grade in one of her pre-med courses even though she took a comprehensive exam the morning after a tough road loss. The coach provides other specifics about Mary's outstanding achievements in the classroom and volunteer activity in the community.

John's coach, seeing an opportunity to quell some of the constant negative rumors by characterizing John as a malcontent, instructs the team's student-manager to allow the reporter to see John's practice records. Those reports show that he was consistently late to practice, was habitually late boarding the bus on road trips, and missed numerous classes. The manager tells the reporter that based on John's transgressions, the coach decided to "discipline" John privately, and that is what began John's "vendetta" against the coach. The manager also says that John has not been "making his grades" and implies that he may not be eligible to play next season. The manager summarizes the situation by informing the reporter that "Coach did everything he could to help John, but John didn't take care of his business in the classroom, in the dorm or on the practice court."

The release of student-athlete academic information by colleges and universities generally falls into one of these two categories. The first involves the release of grade point averages (GPAs) and other favorable information illustrated by public lists of those students who earn academic honors in cases such as Mary's. For example, the College Sports Information Directors of America (CoSIDA) select the "Academic All-America Team" in twelve sports, in each NCAA Division. Each student-athlete selected for this honor has his or her grade point average posted on the CoSIDA webpage.3

The other category involves students such as John, who suffer from release of embarrassing records, or information that reflects negatively on the student. Since the information usually comes from only one source, who could have ulterior motives, John might be unfairly portrayed in the rumors, or by the media.

This article will consider the effect of the Buckley Amendment on both of these students: Mary, the "good" student, and John, the "bad" student who is characterized as a troublemaker. Specifically, the article will review the provisions of the Buckley Amendment, and focus on a recent U.S. Supreme Court case that resolved the issue of an offended student's right to file suit for damages when academic records are unlawfully released. Further, the article

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3. CoSIDA Online, Academic All-America available at http://www.cosida.com/allamerica/default.asp, with links to individual Academic All-American teams containing respective student athletes' grade point averages.
will document instances of institutional double standards regarding the release or protection of student-athlete academic records. Finally, the article will review cases in which plaintiffs utilized the Buckley Amendment seeking to recover damages for unlawful release of educational records, or in which various defendants asserted the Buckley Amendment protections to support withholding information from the media.

II. THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT

Mary is pleased with the article that ultimately appears in the local sports section. She is thrilled to be publicly recognized, and she views the complimentary article as validating her years of hard work, practice, and study. It never crosses her mind that the university may have violated her privacy rights.

On the other hand, John is outraged when he reads the article containing specific information about his practice and study habits. He feels betrayed and sets out to sue the coach, athletic director, and university for violating his privacy rights under the Buckley Amendment. After all, at the beginning of each competition year the athletic department advised him that his educational records could not be released without his permission, and he certainly never gave his permission for the release of the information contained in the article. Although he cannot reverse the release of his records, John is confident that he will be able to hold the coach legally accountable for violating his rights.

A. History of FERPA and the Rights Granted Therein

In 1974, U.S. Senator James Buckley was disturbed because of "the growing evidence of the abuse of student records across the nation." Based on his concerns, Sen. Buckley introduced the Family Educational Rights and Privacy Act as a floor amendment to other education legislation. According to the sponsors of the Act, "[t]he purpose of the Act is two-fold – to assure parents of students... access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent."

5. Id.
Congress ultimately passed the Family Educational Rights and Privacy Act, commonly referred to by its acronym, "FERPA," or as the "Buckley Amendment." FERPA includes provisions granting students and their parents (in some cases) access to, and the right of inspection and review of, educational records. FERPA also contains provisions granting a right of privacy to each student in educational institutions receiving federal funds, and prohibiting release of an individual student’s educational records.

Subsection (a) of FERPA establishes the student’s right to inspect and review his or her educational records, and contains the applicable definitions. The provisions pertinent to the release of records are found in subsection (b), and provide the following:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information... ) of students without the written consent of their parents... 

The Act applies only to an “educational agency or institution” which is defined as “any public or private agency or institution which is the recipient of funds under any applicable [educational] program.”

The Act also defines a “student” as “any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.”

The subject of the Act is “education records” which is defined as “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.”

The Act excepts from the definition of education records the items contained in a school’s “directory information,” identified as the “student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received,

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8. 20 U.S.C. § 1232g(a).
9. 20 U.S.C. § 1232g (b)(1). The statute also provides for several exceptions not relevant to the subject of this article.
and the most recent previous educational agency or institution attended by the student.\textsuperscript{13}

Although both sections (a) and (b) grant the rights and privileges under the Act to the parents of students, section (d) transfers those rights and privileges to the student: "[W]henever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student."\textsuperscript{14}

The final pertinent provision of the Act is the enforcement provision which provides that "[t]he Secretary [of Education] shall take appropriate actions to enforce this section and to deal with violations of this section."\textsuperscript{15} This is the only specific enforcement provision contained in the Act.

Clearly, the information about John that was released satisfied the definitions and requirements set forth in the Buckley Amendment. The university was an educational agency, John was a student, and the information released was included in the definition of educational records, but was not directory information. John's family hires an attorney to represent him in litigation against the coach, the athletic director, and the university, still confident that the defendants will ultimately be liable for releasing John's records.

\textbf{B. Cases Alleging FERPA Violation and Seeking Private Right of Action for Individuals}

When John's attorney is employed, he begins to research the provisions of the Buckley Amendment. Although he is satisfied that the information has been released in violation of the protections contained in the Act, he is uncertain of the remedies available to students whose records have been released.

Since passage of FERPA, several courts have reached different conclusions when considering the potential remedies available for violation of the Act. In one group of cases, the courts concluded that aggrieved students do not have a private right of action to sue for violations of FERPA.\textsuperscript{16}

\begin{itemize}
  \item[13.] 20 U.S.C. § 1232g(a)(5)(A).
  \item[14.] 20 U.S.C. § 1232g(d).
  \item[15.] 20 U.S.C. § 1232g(f).
  \item[16.] Girardier v. Webster Coll., 563 F.2d 1267, 1276-77 (8th Cir. 1977) ("The statute does not say that a private remedy is given. Enforcement is solely in the hands of the Secretary of Health, Education and Welfare under subsection (f). [footnote omitted] Under such circumstances, no private cause of action arises by inference."); Tarka v. Franklin, 891 F.2d 102, 104 (5th Cir. 1989), \textit{cert. denied}, 494 U.S. 1080 (1990) ("The Fifth Circuit has found that FERPA does not explicitly provide
Conversely, in another series of cases, courts have held that students can sue for violations of FERPA using the provisions of 42 U.S.C. § 1983 (the federal Civil Rights Statute).\footnote{17} Under this series of cases, the courts have held that § 1983 creates a private right of action for violations of FERPA. In February, 2002, the U.S. Supreme Court had an opportunity to resolve the dispute, but declined to do so, noting that "it is an open question whether FERPA provides private parties . . . with a cause of action enforceable under § 1983."\footnote{18}

However, the Court had previously agreed to hear the case of Gonzaga University v. Doe,\footnote{19} in order to resolve the difference of opinion among the courts. The Court recognized that "state and federal courts have divided on the question of FERPA's enforceability . . . [and] [t]he fact that all of these courts have relied on the same set of opinions from this Court suggests that our opinions in this area may not be models of clarity."\footnote{20} Accordingly, the Court agreed to hear the case in order "to resolve the conflict among the lower courts and in the process resolve any ambiguity in our own opinions."\footnote{21}

The resolution of this case will determine the rights and remedies available to John for the unlawful release of his educational records.

\footnote{17}{Fay v. S. Colonie Cent. Sch. Dist., 802 F.2d 21, 33 (2\textsuperscript{nd} Cir. 1986) ("The district court correctly determined that FERPA creates an interest that may be vindicated in a section 1983 action . . . Although FERPA authorizes extensive enforcement procedures created by regulation, (citation omitted), these regulations do not demonstrate a congressional intent to preclude suits under section 1983 to remedy violations of FERPA."); Brown v. City of Oneonta, 106 F.3d 1125, 1131 (2\textsuperscript{nd} Cir. 1997) ("It is clear that 'FERPA creates an interest that may be vindicated in a section 1983 action'"), citing Fay, cert. denied 534 U.S. 816; Falvo v. Owasso Indep. Sch. Dist. No. I-011, 233 F.3d 1203, 1213 (10\textsuperscript{th} Cir. 2000) rev'd. on other grounds, 534 U.S. 426, ("[T]he specific violation of FERPA which she alleged is actionable under § 1983.").}


\footnote{19}{536 U.S. 273 (2002)[hereinafter Gonzaga Univ. I].}

\footnote{20}{Id. at 278.}

\footnote{21}{Id.}
III. GONZAGA UNIVERSITY V. DOE

A. Facts and Procedural History

John Doe was an undergraduate student in the School of Education at
Gonzaga University, a private institution located in Spokane, Washington.22
Upon graduation, he planned to become an elementary teacher in the public
school system in the State of Washington, which required "an affidavit of
good moral character from a dean of [the student's] graduating college or
university."23 In October, 1993, Roberta League, a Gonzaga staff member
described as the "teacher certification specialist," overheard one student tell
another that Doe had "engaged in acts of sexual misconduct" against a female
undergraduate student.24

League then began an investigation into the alleged misconduct, which
culminated in her contacting the state agency responsible for teacher
certification, advising agency personnel of the alleged conduct, and providing
Doe's identity.25 However, Doe was unaware of the investigation or report
until six months later, when he was asked to come to the office of Dr. Corrine
McGuigan, the dean of the Gonzaga School of Education.26 Doe was "escorted
to a private room and left to read a letter from McGuigan."27 In the letter,
McGuigan advised Doe that in light of the allegations against him, she would
not complete the affidavit required for certification as a Washington school
teacher.28 Further, McGuigan refused to reveal the complainant's name, and
advised Doe and his parents that there was no right of appeal regarding the
decision.29 In response, Doe sued Gonzaga, League and others in state court,
seeking recovery for defamation, invasion of privacy, negligent investigation,
breach of educational contract, and violations of FERPA for unauthorized

22. Id. at 277.
23. Id.
25. Id.
v. Gonzaga University will be referred to in the footnotes as Gonzaga Univ. II.
27. Id.
28. Id.
29. Id. The complainant, identified as Jane Doe, testified at trial by videotaped deposition and
"denied that John Doe had sexually assaulted her. She denied that she had made many of the
statements that Gonzaga personnel attributed to her", and that she had told McGuigan that "Gonzaga
personnel were "wrong in their assumptions" about what had happened in her relationship with John
Doe."
release of personal information.\textsuperscript{30}

To support the cause of action for recovery under FERPA, Doe alleged that the disclosure of the personal information constituted a "federal right" enforceable under the federal Civil Rights Act.\textsuperscript{31} The Civil Rights Act is codified at 42 U.S.C. § 1983, and is commonly referred to as "§ 1983". The pertinent provisions of § 1983 provide:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.\textsuperscript{32}

According to Doe, by disseminating the private information, Gonzaga and the individual defendants violated the provisions of FERPA, causing damage to Doe by releasing such information about the alleged sexual assault. A jury found in Doe’s favor on all counts, awarding damages in an aggregate of $1,155,000.00, with $450,000.00 representing his damages for the FERPA claims. The trial court entered judgment accordingly.\textsuperscript{33}

The Court of Appeals of Washington reversed on all counts, except the defamation claim, which it remanded, ordering the trial court to modify the court's jury instructions on retrial.\textsuperscript{34} The Washington Supreme Court reversed the Court of Appeals, and reinstated the jury verdict on Doe's claims for defamation, invasion of privacy, violation of his rights under FERPA, and breach of contract.\textsuperscript{35} On application by the University, the United States

\textsuperscript{30} Id. at 395-96.

\textsuperscript{31} 42 U.S.C. § 1983 (2002), which provides in full:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

\textsuperscript{32} Id.

\textsuperscript{33} Gonzaga Univ. I, 536 U.S. at 277. The damages awarded for other causes of action are listed in the Washington Supreme Court opinion in Gonzaga Univ. II, 24 P.3d at 396.

\textsuperscript{34} Doe v. Gonzaga Univ., 992 P.2d 545, 559 (Wash. Ct. App. 2000). The Washington Court of Appeals opinion in Doe v. Gonzaga Univ. will be referred to in the footnotes as Gonzaga Univ. III.

\textsuperscript{35} Gonzaga Univ. II, 24 P.3d at 404. Recovery on the negligent investigation claim was
Supreme Court granted certiorari.36

B. Analysis of U.S. Supreme Court Decision

The U.S. Supreme Court reiterated that FERPA was passed pursuant to the power authorizing Congress to spend public money, and its provisions conditioned the authorization to receive federal educational funds on "certain requirements relating to the access and disclosure of student educational records."37 The Court framed the issue presented for resolution as "whether a student may sue a private university for damages under... § 1983... to enforce provisions of... [FERPA]."38

The Court held that Doe could not sue the University, "because the relevant provisions of FERPA create no personal rights to enforce under 42 U.S.C. § 1983."39 The Court focused on two aspects of the Act to rationalize its conclusion that individuals had no private enforcement right under the Act: (1) The enforcement scheme established in the Act, and (2) Congress’ failure to confer individual rights in the Act.40

1. Enforcement Scheme Established in FERPA

To decide the case, the Court scrutinized the provisions of the Act which established certain conditions for eligibility to receive federal funds: "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records."41 To support its conclusion that no individual rights exist, the Court also cited the enforcement provisions contained in the Act, including the federal regulations issued to assist with enforcement of the Act. Specifically, the Court pointed to the provisions of the Act that accorded to the Secretary of Education the responsibility to "deal with violations" of the Act,42 and instructed the Secretary to "establish or designate an office and review board within the Department for the purpose of investigating, processing,

37. Gonzaga Univ. I, 536 U.S. at 278.
38. Id. at 276.
39. Id.
40. Id. at 273.
41. Id. at 278-79 (quoting 20 U.S.C. § 1232g(b)(1)).
42. 20 U.S.C. § 1232g(f) (emphasis added).
reviewing, and *adjudicating* violations of this section."\(^{43}\)

Pursuant to the directive to create a review board, the Secretary established the Family Policy Compliance Office ("FPCO") to act as the Review Board "to enforce the Act with respect to all applicable programs."\(^{44}\) The Court cited other provisions contained in the Code of Federal Regulations as further evidence that Congress intended the Act to be enforced by the Secretary, including provisions allowing parents and eligible students to file complaints regarding an alleged violation,\(^{45}\) provisions authorizing institution of an investigation of each timely complaint,\(^{46}\) provisions requiring notification of the educational agency or institution that a complaint has been initiated and requesting a written response,\(^{47}\) and provisions that require delivery of the FPCO's factual findings to all parties if a violation is present,\(^{48}\) together with a "statement of the specific steps that the agency or institution must take to comply"\(^{49}\) with FERPA.\(^{50}\)

2. Congress' Failure to Confer Individual Rights Under FERPA or § 1983

Doe additionally contended that disclosing a student's education records to unauthorized persons in violation of FERPA "confers upon any student ... a federal right, enforceable in suits for damages under § 1983."\(^{51}\) The Court disagreed that FERPA created an individual right to sue, and cited several reasons for its conclusion.

First, the Court affirmed that "we have never before held, and decline to do so here, that spending legislation drafted in terms resembling those of

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43. 20 U.S.C. § 1232g(g) (emphasis added).
44. 34 CFR § 99.60(c) (2003). The current provisions of 34 CFR § 99.60 provide in subsection (b) that the FPCO is designated to "(1) Investigate, process, and review complaints and violations under the Act and this part; and (2) Provide technical assistance to ensure compliance with the Act and this part;" and provide in subsection (c) that "the Office of Administrative Law Judges (is designated) to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs." 34 CFR § 99.60(b) (2003).
46. *Id.*, citing 34 CFR § 99.64(b) providing that "The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part."
47. *Id.*, citing 34 CFR § 99.65.
48. *Id.*, citing 34 CFR § 99.66(b).
49. *Id.*, citing 34 CFR § 99.66(c)(1).
50. Although the Court does not cite 34 CFR § 99.67(a), it provides additional enforcement options, including (1) withholding further payments under any applicable program; (2) issuing a complaint to compel compliance through a cease-and-desist order; or (3) terminating eligibility to receive funding under any applicable program.
FERPA can confer enforceable rights."52 Further clarifying its ruling, the Court cited an earlier opinion holding that the "typical remedy" for not complying with federal spending legislation "is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State."53 Such spending legislation creates no private enforcement right under § 1983 "unless Congress 'speaks with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights."54

Finally, the Court scrutinized Congressional intent in passing FERPA to determine if Congress had the requisite unambiguous intent to confer such individual rights. Citing various cases previously decided by the Court, Doe contended that the Court had created "a relatively loose standard for finding rights enforceable by § 1983," claiming that "a federal statute confers such rights so long as Congress intended that the statute 'benefit' putative plaintiffs."55 The Court acknowledged the lower courts' "confusion" on the issue, and the possible interpretations by some courts and litigants that "something less than an unambiguously conferred right is enforceable by § 1983."56

Some lower courts had allowed plaintiffs "to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect."57 However, the Court now made clear that its earlier opinions did not support such a contention:

We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. Section 1983 provides a remedy only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Accordingly, it is rights, not the broader or vaguer "benefits" or "interests," that may be enforced under the authority of [§ 1983].58

Summarizing its holding on the FERPA and § 1983 issues, the Court stated as follows:

In sum, if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms... FERPA's
nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education’s distribution of public funds to educational institutions. They therefore create no rights enforceable under § 1983.\textsuperscript{59}

Accordingly, student-athletes such as John (or any other students) aggrieved by the unlawful release of educational records by his or her institution in violation of FERPA have no individual right to file a private civil suit. The only recourse available against the offending school is action through the office of the Secretary of Education.

IV. UNIVERSITY STUDENT-ATHLETES AND THE BUCKLEY AMENDMENT

There is abundant evidence that universities are pleased to cheer the accomplishments of high achieving students such as Mary, illustrated by listing names and grade point averages of Academic All-Americans on the CoSIDA webpage. However, there is also evidence that athletic departments rely upon the Buckley Amendment to protect institutions from the ensuing embarrassment that would result from release of the academic records of its under-performing student-athletes.

A. Athletic Department Protection of Educational Records – Compliance or Hypocrisy?

While the FERPA violation involving John was perpetrated by a single coach of one sport, athletic administrators have relied upon the Buckley Amendment as authority to withhold information about student-athletes, thereby shielding the university and its athletic department from embarrassment resulting from its students’ academic shortcomings. Some writers argue that such inconsistent use of the Buckley Amendment is hypocritical.

In an article discussing the practical effect of the Buckley Amendment on university athletic departments,\textsuperscript{60} the author summarizes his experience as follows:

\textit{[P]eople often have trouble understanding how to get information from schools under the Buckley Amendment... [R]eally, to}

\textsuperscript{59} Id. at 290.

understand the Buckley Amendment all you have to know is two things: (1) If the desired information will make a school look good, you probably can have access to it. (2) If the desired information will make a school look bad, you probably cannot have access to it. It’s that simple.61

The author relates the story of four Drake University basketball players who were suspended when their GPAs fell below the University’s internal 2.0 grade point requirement. The University refused to release the students’ GPAs to the media. When two of the suspended players filed suit seeking relief from the University’s action, their GPAs were revealed – 1.0 on a scale of 4.0.62

The author compares that decision with one made by the athletic department at the University of Northern Iowa. The University identified three players from the women’s basketball team who had achieved 4.0 GPAs the prior semester, by including their achievement in the team’s pre-game summary delivered to the media.63

The author draws the conclusion that “Universities are delighted to violate student privacy and tell you who has a 4-point and even what athletes have better than 3-points. But the lower you go on athlete GPAs, the more Buckley Amendment concerns kick in.”64

Similarly, the editor of a local newspaper wrote about an experience with the Iowa State University athletic department.65 The University released a list containing the names and GPAs of 124 student-athletes who had earned a GPA of 3.0 or better during the previous two semesters.66 When the editor requested the GPA of all student-athletes not included on the list, the Iowa State Athletic Director refused to provide the information, stating that “[t]he Athletic Department and Iowa State University are prohibited from releasing this information without the permission of the student-athletes... The information is protected by the Family Educational Rights and Privacy Act of 1974.”67

Not deterred by the University’s refusal to release the information, the editor asked for a copy of the document signed by each of the 124 student-athletes authorizing the athletic department to release his or her individual

61. Id.
62. Id.
63. Id.
64. Id.
66. Id.
67. Id.
GPA. After being provided a copy of the document, then known as NCAA Form 97-3a, the editor pointed out that the document required each student-athlete to sign the form in order “to participate in intercollegiate competition.” Relying upon the assurances by the athletic director that the form allowed the release of GPAs, and recognizing that all student-athletes must sign the form to be eligible, the editor deduced that even those who had GPAs below 3.0 signed the form, thereby also authorizing release of their GPAs.

Once again, the editor asked the athletic director for the GPAs of all the student-athletes who signed Form 97-3a. The athletic director again refused, saying there had been an oversight, and thanking the editor for bringing it to his attention. After the editor’s request, the athletic department prepared a new form that all Iowa State student-athletes were required to sign. The form specifically authorized “the Director of Athletics to authorize the public release of specific information about my academic excellence (3.0 G.P.A. or higher) for purposes of academic recognition.”

Although the editor made his point, the athletic department ultimately prevailed in concealing, or protecting, depending on your point of view, the GPAs of those students averaging below 3.0. To the editor, this blatant use of a double standard by the athletic department was hypocritical. To the athletic department personnel, they were merely complying with the provisions of the Buckley Amendment.

B. NCAA Forms Relating to the Buckley Amendment

As the Iowa State Athletic Director correctly points out, student-athletes competing in NCAA competitions are required to sign certain forms as a prerequisite for eligibility to compete. The NCAA requires each university to secure signed forms from all student-athletes “prior to the student’s participation in intercollegiate competition each academic year.” Failure to

68. *Id.*

69. The form number changes each year and is identified by the last two digits of the current year, e.g. the form for 2003 is designated as Form 03-3a.


71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*


77. *Id.* at 3.2.4.5.1.
sign the form each year "shall result in the student-athlete's ineligibility for participation in all intercollegiate competition." 78

The form includes information relating to eligibility, recruitment, financial aid, amateur status, previous positive drug tests and involvement in organized gambling activities. 79 Although the NCAA has promulgated different forms for each of the NCAA divisions, Part II of each form contains identical terms and conditions relating to the Buckley Amendment. 80

The form advises the student-athlete that FERPA protects the privacy of educational records, and that such records may not be released without the student-athlete's consent. 81 The form also contains a provision authorizing the disclosure of the educational records of the student-athlete. 82 However, the authorization is not a blanket release, but is limited to two categories of information.

The first category allows release of certain information only to the institution, its athletic conference, and the NCAA. 83 The items allowed to be released to these entities are (1) the Buckley Amendment Form, (2) results of any NCAA drug tests, (3) results of positive drug tests performed by other national or international athletics organizations, (4) all transcripts from high school or any other higher education institution, (5) pre-college test scores and related information, (6) financial aid records, and (7) all other information relating to NCAA eligibility. 84

The form restricts release of this information for the limited purposes of (1) determining the student-athlete's eligibility for NCAA participation or athletically related financial aid, (2) inclusion in summary information reported to the NCAA by each institution, (3) information relevant for NCAA research studies, and (4) NCAA compliance review. 85

The second category authorizes only the NCAA (not the institution or

78. Id. at 14.1.3.1. Failure of the university to secure the signed form from all student-athletes is deemed "an institutional violation" under NCAA Bylaws.

79. Id.


81. NCAA Form 03-3a, Student-Athlete Statement – Division I, Part II.

82. Id.

83. Id.

84. Id.

85. Id.
conference) to release personally identifiable information from educational records to a third party, including the media, "as necessary to correct inaccurate statements reported by the media or related to a student-athlete reinstatement case, infractions case or waiver request." Although the form allows the NCAA to release any such reinstatement or infractions case information or waiver request, the student-athlete "will not be identified by name by the NCAA in any such published or distributed information."

Nowhere does the form authorize the release of grade information, whether good or bad, of individual student-athletes. Unless other universities have followed the lead of the Iowa State athletic department and developed forms specifically authorizing release of records demonstrating the athlete's academic excellence, universities continue to violate the Buckley Amendment when releasing student-athlete academic records.

V. SPORT RELATED FERPA CASES

Most sports-related FERPA cases involve the use of FERPA in one of two ways. In the first series of cases, student plaintiffs have filed suit against a school for releasing educational records without the requisite waiver of the Buckley Amendment. In all of these cases, the plaintiffs relied not only on violations of FERPA, but on numerous other constitutional, statutory and common law causes of action. In all of the cases, the court resolved the issues on grounds other than the FERPA related claims.

In the other series of cases, members of the media utilized state open record statutes to request information from public universities or related entities. In response, the defendants refused to release the information, citing the privacy provisions of the Buckley Amendment. Using the Buckley Amendment in this manner was unsuccessful in all of the cases.

A. Cases Alleging Violation of FERPA for Releasing Student Educational Records

The facts involving the hypothetical John in this article were derived from Axtell v. The University of Texas at Austin. At the end of a disappointing year for the University of Texas basketball team, some of the players met with Athletic Director DeLoss Dodds and expressed displeasure with the coaching staff, particularly head coach Thomas Penders. One of the players, Luke

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86. NCAA Form 03-3a, Student-Athlete Statement – Division I.
87. Id.
88. 69 S.W.3d 261 (Tex. App. 2002).
89. Chip Brown, Texas Basketball Saga Continues, ABILENE REPORTER-NEWS, April 1, 1998,
Axtell, accused Penders of "verbal abuse, dishonesty and failing to develop players."90 Penders ultimately suspended Axtell from the basketball team for "academic reasons," because Axtell "refused to go to study hall or meet with tutors and his [academic] performance has been indicative of that."91

A day after the suspension, an assistant basketball coach released Axtell's academic records to an Austin radio station, resulting in the records being read over the air on the stations.92 After a University investigation, the University apologized to Axtell in a news release, stating that "academic information concerning Mr. Axtell was wrongfully released . . . the information inaccurately reflected Mr. Axtell's grades and current academic status. Mr. Axtell was not academically ineligible under University rules."93

Notwithstanding the apology, Axtell sued the University, alleging among other things that the University violated FERPA by releasing the academic records. The case was ultimately resolved adverse to Axtell on sovereign immunity grounds, and Axtell conceded that the FERPA violations did not create a private right of action against the University.94

In Doe v. Woodford County Board of Education,95 John Doe was a high school freshman on the junior varsity basketball team at Woodford County High School.96 He was a hemophiliac who had contracted hepatitis B, but had participated in athletics all his life without health complications.97 The school had a "no-cut" policy for the junior varsity team, and John began practicing with the team.98 Shortly thereafter, the principle of the Woodford Middle School (who was aware of John's condition) noticed John practicing with the team and advised the junior varsity coach that he should review John's medical records on file with the school.99 John overheard this conversation, and alleged that other students also heard the same conversation, thereby violating his Buckley Amendment privacy rights.100

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91. Id.
93. Id.
94. Axtell, 69 S.W.3d at 264.
95. 213 F. 3d 921 (6th Cir. 2000).
96. Id. at 923.
97. Id.
98. Id.
99. Id.
100. Doe, 213 F.3d at 923.
After reviewing John’s medical records and discussing the situation with the high school principal, the coach placed a “hold” on John’s status as a player on the team until the school received medical direction and clearance for physical activities from John’s doctor. John was informed that he could not practice with the team pending receipt of this information, and was offered a position as manager of the team. Significantly, John was never removed from the team, but he was not allowed to practice as a team member.

After receiving a vague letter from John’s doctor about John’s ability to participate, the school decided to allow John to fully participate as a member of the team. However, John was never informed of this decision. The day after the decision was made, John’s mother organized a meeting with school officials, at which meeting his mother informed the school officials that John no longer wanted to be a member of the team. Thereafter, John’s mother sued the school and officials for violation of § 504 of the Rehabilitation Act, Americans with Disabilities Act, and FERPA.

The District Court entered summary judgment in favor of the defendants on all of Plaintiff’s claims, and the Sixth Circuit affirmed. The court denied the FERPA claim for two reasons: (1) Because the conversations between school personnel were contained within the FERPA exception allowing disclosure to “other school officials, including other teachers within the educational institution . . . who have been determined to have a legitimate educational interest in the child”, and (2) lack of evidence that anyone else heard the conversation.

In Daniel S. v. Board of Education of York Community High School, the plaintiff was a seventeen-year-old student enrolled in a physical education

101. *Id* at 923-4.
102. *Id.* at 924.
103. *Id.* The thrust of the letter stated: “I have some reservations about [John’s] health but I think overall, he is capable of playing basketball. He does have hemophilia which is going to put him at some risk for difficulties.”
104. *Id.*
105. *Doe*, 213 F.3d at 923.
109. *Id.*
110. *Id.* at 926, citing 20 U.S.C. § 1232g(b)(1)(A).
111. *Id.* at 927. The court did not discuss the effect on the court’s ruling if the conversation had been heard by other students.
class at York Community High School. Daniel and another student ripped their school-issued swimsuits during a swimming class, and were required by their instructor to remove their swimsuits and stand naked in the shower room while the others in the class showered and dressed. Daniel stood naked for a total of sixteen minutes, and was seen by students from two different physical education classes. The teacher, who was also coach of the high school cross-country track team, told his team of the incident without naming the students, but the identity of the students removed from the class was common knowledge among other students at the school.

Daniel's parents filed suit against the school, alleging numerous constitutional, statutory and common-law causes of action, in addition to an allegation that the school and teacher violated the provisions of FERPA. The plaintiffs argued that telling the cross-country team about the dismissals was a violation of Daniel's rights under the Buckley Amendment. The District Court dismissed the FERPA complaint because the information disclosed was not from "school records" and did not result from a "policy or practice" of unauthorized disclosure by the school, both of which are required to establish a FERPA violation. Further, the court noted that "FERPA does not protect information which might appear in school records but would also be 'known by members of the school community through conversation and personal contact.'"

B. Cases Invoking FERPA as Justification for Withholding Records When Responding to Open Records Requests by the Media

The second category of FERPA cases normally involves a member of the media seeking information relating to university athletics or student-athletes. The first case in this category, involves a reporter seeking information from a regional athletic conference regarding money disbursed to student-athletes. The second case involves media requests for information developed during a NCAA investigation into alleged recruiting violations.

The earliest case in which FERPA was used as a defense was *Arkansas*
Gazette Company v. Southern State College. The Arkansas Intercollegiate Athletic Conference (AIC) is composed of ten colleges and universities located in Arkansas. The constitution and by-laws of the AIC require the member institutions to "submit an annual report detailing the amount of money disbursed to student athletes." The Arkansas Gazette Company sought disclosure of the amount of money paid to student athletes in the previous school year, and when denied access to the information, sued the AIC under the Arkansas Freedom of Information Act (FIA). The lower court held that the requested information constituted "educational" records, and was not subject to disclosure based on the privacy provisions of both the Arkansas FIA and the Buckley Amendment.

The Arkansas Supreme Court reversed and remanded the case, finding that the records were not protected under either the state Freedom of Information Act or FERPA. The court found that the records of the AIC were public records since the AIC was partially supported by public funds through the annual dues paid by the state-supported member institutions.

Regarding the FERPA defense raised by the AIC, the court acknowledged that the plaintiff had "specifically deleted from its request any information about individual scholastic records," and "[n]o student has claimed a right of privacy and the standing of the AIC to assert the athlete's claim is doubtful." The court also noted that the AIC was not an "educational agency or institution" as defined in FERPA.

In an ironic twist, the court further noted that the institutions may have already breached the provisions of FERPA by providing information to the AIC that arguably could constitute "educational records" under the act.

The football recruiting scandal at Southern Methodist University led to another use of FERPA as a defense in Kneeland v. National Collegiate...
Carole Kneeland was a reporter for the Dallas Morning News who invoked the Texas Open Records Act seeking information gathered during an investigation of the SMU football program by the NCAA and Southwest Athletic Conference (SWC). After her requests for the information were denied, Kneeland filed suit in state court seeking an order requiring disclosure of the information. The NCAA and SWC defended by arguing that all of the information sought by Kneeland constituted educational records, and that those records were protected by an exception from disclosure. The exception relied upon by the defendants was contained in § 14(e) of the Open Records Act: "Nothing in this Act shall be construed to require the release of information contained in education records of any educational agency or institution except in conformity with the provisions of the Family Educational Rights and Privacy Act." The case was removed to federal district court, which held that the NCAA and SWC were not "education agencies or institutions under the Buckley Amendment" depriving them of the protections set forth in the exception. Further, the district court found that the NCAA and SWC were governmental bodies as defined in the Open Records Act, since they were funded in part by public funds, and ordered that the records be released to Kneeland.

However, the Fifth Circuit reversed the district court, concluding that "the NCAA and SWC are not governmental bodies within the intendment of the Texas Open Records Act." The Fifth Circuit did not discuss the FERPA claims in its opinion.

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133. 850 F. 2d 224 (5th Cir. 1988), cert. denied 488 U.S. 1042. The Fifth Circuit Court opinion in Kneeland will be referred to in the footnotes as Kneeland I.

134. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1986), now known as the Public Information Act, codified at TEX. GOV'T. CODE ANN. § 552.

135. Kneeland I, 850 F.2d at 225.

136. Id. at 226.

137. Id.


139. Id.

140. Kneeland I, 850 F.2d at 226-27.


142. Kneeland I, 850 F.2d at 231.
VI. CONCLUSION

The Buckley Amendment was passed by Congress to ensure that students have access to their educational records, and to provide a right of privacy that limits the release of educational records without the student’s consent. When an educational institution releases protected information without the student’s consent, there had been a disagreement among courts whether the offended student had a right to sue the institution for damages.

The United States Supreme Court settled the uncertainty in *Gonzaga University v. Doe*, holding that only the Department of Education was empowered to enforce the remedial provisions contained in the Act. The Court concluded that an aggrieved student had no private cause of action against an institution for violating the privacy rights created in the Family Educational Rights and Privacy Act (FERPA).143

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143. *Id.*